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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

NO.....

MONROE J. STEWART,
Petitioner,

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Monroe J. Stewart, respectfully prays for a writ of certiorari herein to review a certain final decision of the Circuit Court of Appeals of the Fifth Circuit in the above entitled action. The opinion and decision of said court having been rendered and filed on December 5, 1942, and a petition for rehearing which was, after being entertained and considered by said court, denied on January 16, 1943. The effect of which said decision by the Circuit Court of Appeals was to affirm a conviction of petitioner obtained by improper conduct of the District Attorney; and to affirm a conviction in violation of the rights guaranteed to petitioner by the Sixth Amendment to the Constitution of the United States.

QUESTIONS INVOLVED

1. Whether a conviction obtained by conduct of the District Attorney, which conduct has been characterized by the Supreme Court of the United States as highly improper, and which was pronounced and persistent, should be permitted to stand.

2. Whether an indictment charging a conspiracy to violate nine separate criminal statutes of the United States, a con-

spiracy to unlawfully do twenty separate and distinct acts, many of which are entirely unrelated, sufficiently informs the accused of the nature and cause of the accusation against him as is required by the Sixth Amendment to the Constitution of the United States.

3. Whether an indictment charging a conspiracy to violate the Internal Revenue Laws relating to alcoholic beverages, without pointing out which of said laws were to be violated by the conspiracy, and also charging in one and the same count a conspiracy to "unlawfully having knowledge of the actual commission of a felony cognizable by the courts of the United States, conceals and not as soon as may be disclose and make known the same to some one of the judges or other persons in civil or military authority under the United States;" which indictment could be sustained by proof of a conspiracy to unlawfully conceal the commission of counterfeiting or treason or any other felony, sufficiently informs the accused of the nature and cause of the accusation against him as is required by the Sixth Amendment to the Constitution of the United States.

4. Whether the form of the indictment, as a conspiracy indictment, completely destroys the guarantee of the Sixth Amendment to the Constitution, guaranteeing to the accused the right to be confronted with the witnesses against him, and destroys the hearsay rule to the extent of permitting a witness to testify to what he had heard an alleged co-conspirator say, which statements were not made in the presence of the accused and were not made for the purpose of perfecting the object of the conspiracy.

STATEMENT OF FACTS

In December Term 1941 the petitioner, Monroe J. Stewart, was indicted in the District Court for the Middle District of Alabama (R. pp. 2 to 11). The indictment charged a conspiracy

with three named co-defendants and fourteen named co-conspirators who were not indicted, and divers unknown persons, to commit divers offenses against the United States of America. These offenses were alleged to consist of violation of the Internal Revenue Laws of the United States relating to alcoholic beverages and of laws relating to extortion by informer and misprision of felony. The nature of the offenses to be committed was alleged by inserting every single alternative criminal law included in the Internal Revenue Laws relating to alcoholic beverages and every alternative of the statutes as to extortion by informer and misprision of felony. No attempt was made to allege a specific felony which the petitioner conspired to conceal (R. pp. 3, 4, and 5). Petitioner demurred to this indictment on the ground that it did not sufficiently inform him of the nature and cause of the action against him as was guaranteed to him by the Sixth Amendment to the Constitution of the United States (R. pp. 11 to 13), which demurrers were overruled (R. p. 59).

During the course of the trial the District Attorney and his assistant continually stated as facts things which were not in the evidence and not in the record. The District Attorney over continual objection of the petitioner insinuated he had knowledge of facts which were not before the jury. The Assistant District Attorney, when asked by the court whether he proposed to offer any testimony contrary to the petitioner's testimony as to good character (R. p. 329), stated: "We have got some but we won't use it." The Assistant District Attorney stated that he expected to show that one of petitioner's witnesses was engaged in the liquor business, insinuating thereby that he had knowledge of such fact, when it was not true and no effort was made to show that this witness had any connection with the liquor business. The Assistant District Attorney made assertions of personal knowledge as to what was and was not the truth (R. p. 229, R. p. 139). The Assistant District Attorney adopted an insulting attitude towards witnesses for the petitioner (R. pp. 214, 215, 217, 218, 219, 221, and 229.) The District Attorney in argument to the jury, over the objection of the peti-

tioner, stated that in his opinion the defendant beyond all reasonable doubt was guilty as charged (R. p. 305). The Assistant District Attorney further, during the trial of the case, before the jury, stated that it would be to the defendant's interest to make all possible cases against those who were not paying off, and the more cases they made the more people they could get to pay off (R. p. 254).

During the course of the trial the petitioner objected continually to attempts of the prosecution to introduce hearsay testimony. The District Court permitted all such hearsay testimony to go in if they were claimed to be statements by parties who were alleged as co-conspirators (R. pp. 61, 62, 65). This situation was such that the petitioner's counsel raised the question of whether the hearsay rule was completely discarded (R. p. 76). The District Court permitted, over the petitioner's objection, witnesses to testify what an alleged co-conspirator said the petitioner said (R. p. 109); to testify what an alleged co-conspirator said another alleged co-conspirator said (R. p. 84); to what the witness heard an alleged co-conspirator say he could do (R. p. 93, p. 146).

Severance was granted as to petitioner's brother, John D. Stewart. The affirmative charge was given for one of the co-defendants, Dan J. Stephens; the jury acquitted the other co-defendant, J. C. Lewis, but found petitioner guilty. He was sentenced to two years (R. pp. 15, 16). Appeal was duly taken to the Circuit Court of Appeals for the Fifth Circuit, which on December 5, 1942, rendered its decision affirming the judgment in the District Court. Petitioner promptly filed petition for rehearing, which was denied by the Circuit Court of Appeals on January 16. It is to correct this decision that the present proceedings are taken.

RULINGS OF THE COURT BELOW

The District Court wrote no opinion. It overruled the petitioner's demurrer (R. p. 59), thereby in effect holding that the indictment sufficiently apprized the petitioner of the nature

and cause of the accusation against him. It overruled petitioner's objections to the conduct of the District Attorney and his assistant, which objections in some instances were based on a claim that the defendant was entitled to a fair trial (R. pp. 305, 145, 107, 68, 76, 77). The District Court ruled in effect that any hearsay testimony as to statements by alleged co-conspirators were admissible, without regard to the presence or absence of the defendant, or whether such statements were made in furtherance of the conspiracy (R. pp. 61, 65, 76, 84, 93, 95, 109, 119, 169). The District Court overruled petitioner's motion to exclude such testimony, stating that it would be evidence as to whether there was a conspiracy or not (R. pp. 197 and 198).

The Circuit Court of Appeals for the Fifth Circuit affirmed the decision of the court below. It rendered an opinion making no reference whatever to the assignments of error pointing out the improper conduct of the District Attorney. It sustained the action of the lower court in overruling the demurrers, stating:

> "An indictment is not duplicitous because it alleges a conspiracy to commit two or more distinct offenses of the same general character."

Thereby, in effect, the Circuit Court of Appeals held that the crime of unlawfully carrying on the business of a rectifier without having paid the special taxes required by law (R. p. 4) was an offense of the same general character as misprision of felony.

The Circuit Court of Appeals disposed of the objections to the hearsay testimony by saying:

> "In two instances the court admitted evidence over the objection of the appellant, but as no grounds were stated in support of the objections, we do not consider them."

It made no reference to the specific objections raising the question of hearsay testimony (R. pp. 61, 76, 77, and numerous other instances), or to the motion to exclude this testimony (R. pp. 197 and 198).

REASONS FOR GRANTING

The Circuit Court of Appeals for the Fifth Circuit decided a federal question in a way probably in conflict with applicable decisions of this Court in that the Circuit Court of Appeals affirms a judgment of conviction obtained by conduct of the District Attorney, which the Supreme Court of the United States in the case of *Williams v. United States,* 168 U. S. 382, 42 L. ed. 509, and *Berger v United States,* 295 U. S. 78, 79 L. ed. 1314, characterized as highly improper and reversible error.

The Circuit Court of Appeals for the Fifth Circuit decided an important question of federal law which has not been but should be settled by this Court, to-wit, whether an indictment for conspiracy to commit acts which would violate some nine statutes of the United States, three of which are entirely unrelated, sufficiently apprize the defendant of the nature and cause of the accusation against him in accordance with the guarantee of the Sixth Amendment to the Constitution of the United States.

The Circuit Court of Appeals for the Fifth Circuit has decided an important question of general law in a way probably untenable and in conflict with the weight of authority and in conflict with the decisions of other circuits, in that the Circuit Court of Appeals decided that hearsay testimony as to conversations with alleged co-conspirators not on trial, made in the absence of the defendant on trial and not in furtherance of the object of the conspiracy, narrative relations of past events, were admissible in evidence, thereby defeating the right guaranteed to the petitioner under the Sixth Amendment to the Constitution of the United States to be confronted with the witnesses against him, said decision being in conflict with the decisions of *Clark v. United States,* 61 F. (2d) 409; *Whealton v. United States,* 113 F. (2d) 710; *Kuhn v. United States,* 26 F. (2d) 463; *United States v. Nardone,* 106 F. (2d) 41.

CONCLUSION

For these reasons it is respectfully submitted that this petition should be granted.

J. C. FLEMING,
JACK CRENSHAW,
Counsel for the Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

NO._____

MONROE J. STEWART,
Petitioner,

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION

OPINIONS

The District Court for the Middle District of Alabama wrote no opinion, but the opinion of the Circuit Court of Appeals for the Fifth Circuit written by Judge Holmes, was filed on December 5, 1942, and appears at page_____ of the Record. This was reported in_____ F. (2d)_____.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended (U. S. C. A. Title 28, Section 347). The judgment of the Circuit Court of Appeals was rendered December 5, 1942. Petition for rehearing was denied January 16, 1943. This petition was filed February 15, 1943.

SUMMARY OF FACTS

The facts are stated in the petition at page 3.

The indictment charged a conspiracy to violate the unrelated statutes of the Internal Revenue Laws, and misprision of felony. Demurrer raising the proposition that this did not sufficiently inform the defendant of the charge against him was overruled.

During the trial the Assistant District Attorney stated as a fact that it would be to the defendant's interest to make all possible cases against those who were not paying off and the more cases they made the more people they could get to pay off, and in general was guilty of highly improper conduct throughout the entire trial. The court below permitted any hearsay testimony which the prosecution sought to admit, so long as it was as to a statement by an alleged co-conspirator.

ARGUMENT

I

Throughout the entire trial the District Attorney and his assistant were guilty of conduct which this Court has characterized as highly improper.

> *Williams v. United States,* 168 U. S. 382, 42 L. ed. 509;
> *Berger v. United States,* 295 U. S. 78, 79, L. ed. 1314.

When the petitioner introduced testimony of good character the court asked the Assistant District Attorney (R. p. 239): "Does the District Attorney propose to offer any testimony contrary to the defendant's testimony?" The Assistant District Attorney answered: "We have got some, but we won't use it." This statement could have been made only for improper purposes, and it is characteristic of the attitude of the District Attorney throughout the entire trial. The District Attorney, over objection of the defendant, stated his belief in the guilt of petitioner (R. p. 305); the District Attorney stated in effect to the jury that he had knowledge of facts which were not in the record, and of assuming prejudicial facts not in evidence (R. pp. 68, 76, 78, 139, 219, 145, 229). The Assistant District Attorney misquoted the testimony of witnesses to the jury. For instance, on page 145 of the Record he stated to the jury: "He said he wouldn't haul liquor in it and he would have to park the truck," a fact which the witness had refused to testify to. He continually suggested by his questions that statements had been made to him personally out of court, in respect to which no proof was of-

fered. In addition to the instance given above with reference to character testimony, the Assistant District Attorney stated (R. p. 92) that the girls (meaning Willie Mae Hobbie)) was in the liquor business and assisting in the liquor business, and testimony was introduced on the strength of this representation. This was not true, and no effort was made by the Assistant District Attorney to show that Willie Mae Hobbie had any connection with the liquor business (see her cross examination, R. pp. 256, 257, 258). He assumed a bullying attitude towards witnesses (R. pp. 107, 219, 221).

In connection with the examination of the witness Gladys Clark (R. p. 254 the Assistant District Attorney stated before the jury:

> "It would be to the defendant's interest to make all possible cases against those who were not paying off, and the more cases they made the more people they could get to pay off."

The decision of the Circuit Court of Appeals permitting such conduct to stand is directly contrary to the decision of this Court in *Williams v. United States*, 168 U. S. 382, 42 L. ed. 509. In that case, a trial for permitting immigrants to enter improperly, the District Attorney stated:

> "No doubt every Chinese woman who didn't pay Williams was sent back."

This Court said:

> "The observation made by the prosecuting attorney was, under the circumstances, highly improper. And not having been withdrawn, and the objection to it being overruled by the court, it tended to prejudice the rights of the accused to a fair and impartial trial for the particular offenses charged."

We submit that the conduct of the District Attorney in this case is squarely within the decision of this Court in *Berger v. United States*, 295 U. S. 78, 79 L. ed. 1314. Particularly, we sub-

mit, should the Court be extra careful to prevent such improper conduct by the District Attorney in a conspiracy case, for the Chief Justice of the United States and the Senior Circuit Judges, at the Judicial Conference held in 1925, recognized the difficulty of trying conspiracy cases without prejudice to an innocent defendant. The mere fact that the charge is a serious charge of conspiracy is, we submit, all the less reason for letting down constitutional bars guaranteeing an impartial trial.

II

Indictment charging conspiracy to commit numerous unrelated offenses does not sufficiently inform defendant of the charge against him, as required by the Sixth Amendment to the Constitution of the United States.

The Sixth Amendment to the Constitution guarantees to any defendant the right to be informed of the specific nature of the charge against him so that he may properly prepare his defense thereto. A consideration of the varied types of conspiracies which might be proven under the present indictment is, we believe, sufficient to show that it was far from meeting this constitutional requirement. Conviction under this indictment could be sustained by proof of a conspiracy to unlawfully carry on the business of a rectifier without having paid the special tax. Or, it might be sustained by proof that the defendants, having knowledge of the actual commission of counterfeiting or any other felony cognizable by the Courts of the United States, conspired to conceal the same. Clearly an indictment which charged merely a conspiracy to commit a crime against the United States would not be sufficiently definite. Such indictment would be made no more certain by inserting each of the many criminal statutes of the United States. Yet, in effect, that is what the indictment in the instance case did. The fact that the testimony introduced was restricted to matters having to do with alcoholic beverages does not alter the fact that this indictment did not inform the defendant with any certainty whatever of the charge made against him.

The indictment is clearly defective as an indictment charging the specific offense either or misprision of felony or of extortion by an informer.

Bratton v. United States, 73 F. (2d) 795.

We recognize that in a conspiracy case the crime is a conspiracy, but this does not alter the constitutional guarantee which any defendant has of being sufficiently informed of the nature of the crime with which he is charged. The Chief Justice of the Supreme Court and the Senior Circuit Judges, in their recommendation to the District Judges at the Judicial Conference held in 1925, made this statement:

> "We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony, and we express our conviction that, both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused. Although in a particular case there may be no better concert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that use from the established definitions of conspiracy; yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking. We observe so many conspiracy prosecutions which do not have this substantial basis that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further, the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant."

By the same reasoning this Court should not relax constitutional guarantees and permit a defendant to be prosecuted with a "scatter gun" indictment, an indictment purposely brought to cover such a wide field that the jury may not be able to properly weigh the testimony and will render a conviction on the

feeling that where there is so much smoke there must be some fire. As was stated by the Supreme Court of North Carolina in the leading case of *State v. Van Pelt*, 176 N. C. 633, 49 S. E. 177, 68 L. R. A. 76, 1 Ann. Cas. 495, in considering the sufficiency of a conspiracy indictment:

> "No offense is so easily charged and so difficult to be met, unless the defendants are fully informed of the facts upon which the state will rely to sustain the indictment. While technical objections to indictments are not to be sustained, substantive and substantial facts should be alleged. General and undefined charges of crime, especially those involving mental conditions and attitudes, should not be encouraged. They are not in harmony with the genius of a free people, living under a written Constitution. We can see no good reason why an exception to the general rules of criminal pleadings should be made in favor of this crime."

III

Not only is the defendant guaranteed by the Bill of Rights the right to be confronted with the specific charge against him, the right to an impartial trial without improper conduct by the District Attorney, but he is guaranteed the right by the Sixth Amendment to be confronted with the witnesses against him. The District Court entirely overlooked this constitutional right, apparently on the theory that since it was a conspiracy charge, any hearsay testimony as to a statement by one alleged to be a co-conspirator would be admissible, regardless of the circumstances under which or the purposes for which the statement was made. This entirely emasculated the hearsay rule and the constitutional guarantee. Over proper objection, witnesses were permitted to testify as to conferences with John D. Stewart in February of 1939, at a time when this petitioner was employed by the State Tax Commission of the State of Alabama (R. p. 61). The witness, J. C. McDuffie, was permitted to testify, over objection pointing out this specific objection, that his brother, Henry McDuffie, said he was working as a deputy sheriff. The witness, J. C. McDuffie, was permitted to testify what John

Henry McDuffie said John Arnett said (R. p. 84), although John Arnett was called as a witness for the prosecution. The witness Arnett was himself permitted to testify what John Henry McDuffie said Monroe Stewart said (R. pp. 109, 110), thus making a double hearsay. All of this testimony was from witnesses who claimed to have paid John D. Stewart for protection, but who admitted they had never had a conversation with petitioner, Monroe Stewart, in their life and had never paid Monroe Stewart a penny. The parties making these statements, hearsay evidence of which was permitted, were available to process on behalf of the United States, and no reason was given why they themselves should not be called to testify, and thus the constitutional right of the petitioner to be confronted with the witnesses against him, be protected. The decision of the Circuit Court of Appeals permitting such hearsay testimony, where the declarations were not made for the purpose of perfecting the object of the conspiracy, are, we submit, in conflict with the cases of *Whealton v. United States* (CCA 3rd), 113 F. (2d) 710, and *Kuhn v. United States* (CCA 9th), 26 F. (2d) 463 and should be corrected.

CONCLUSION

Courts to a large extent have liberalized laws of evidence in trials for conspiracy. That is particularly true in the Fifth Circuit Court of Appeals where, in the case of *Shaw v. United States*, 47 F. (2d) 26, likewise written by Judge Holmes, it is held that great latitude should be allowed to the prosecution in the admission of testimony. We submit that correspondingly greater care should be taken to assure that an innocent defendant's rights are not forfeited by reason of this liberalization, and that when liberalization is carried to the extent of evading rights guaranteed by the Constitution, supervisory action should be exercised by this Court. Petitioner had the constitutional right to be informed specifically of the charge against him. This was not done. He had the right to a fair and impartial trial and this the District Attorney denied him. He had

the constitutional right to be confronted with the witnesses against him. The prosecution was not willing to bring these witnesses on the stand and submit them to cross examination, but relied upon proof of what some other witness said he heard somebody else say they had said. For these reasons, we respectfully submit, this Court should grant certiorari and correct the errors of the courts below.

J. C. FLEMING,
JACK CRENSHAW,
Counsel for Petitioner.

I hereby certify that I have served a copy of the foregoing petition and brief on Honorable Burns Parker, District Attorney for the United States for the Middle District of Alabama.

This.....day of....., 1943.

.....
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 744

MONROE J. STEWART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 326–327) is reported at 131 F. (2d) 624.

JURISDICTION

The judgment of the circuit court of appeals was entered December 5, 1942 (R. 328), and a petition for rehearing (R. 330–331) was denied January 16, 1943 (R. 332). The petition for a writ of certiorari was filed February 16, 1943. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictment was fatally defective for indefiniteness and uncertainty.

2. Whether petitioner was deprived of a fair trial by reason of alleged misconduct of the prosecuting attorney.

3. Whether the trial court improperly admitted testimony of statements made by alleged co-conspirators outside of petitioner's presence.

STATUTE INVOLVED

The statute under which petitioner was convicted (Section 88, Title 18, United States Code) reads in so far as pertinent as follows:

> "If two or more persons conspire * * * to commit any offense against the United States, * * * each * * * shall be fined not more than $10,000, or imprisoned not more than two years, or both."

STATEMENT

Petitioner and his brother, John D. Stewart (R. 263), and J. C. Lewis and Daniel J. Stephens were indicted on March 19, 1942, in the District Court for the Middle District of Alabama in one count charging that they, together with fourteen

other persons named as co-conspirators but not as defendants, and other persons unknown to the grand jury, conspired contrary to 18 U. S. C. Section 88 to violate various provisions of the internal revenue laws relating to liquor, and the provisions of the Criminal Code against extortion by an informer and misprision of felony (§§ 145, 146; 18 U. S. C. 250, 251) (R. 2–11).

Petitioner's demurrer to the indictment (R. 11–13) was overruled (R. 59). A severance was granted as to the defendant John D. Stewart (R. 305–306), and the court directed a verdict as to the defendant Stephens (R. 197, 306). The jury found the defendant Lewis not guilty and petitioner guilty (R. 14, 15). Petitioner was sentenced to two years' imprisonment (R. 15–16) and his conviction was affirmed on appeal (R. 328).

The case proved under the indictment may be summarized as follows:

In January 1939, the defendant John D. Stewart, brother of petitioner, became sheriff of Coffee County, Alabama (R. 60, 263). Among his deputies was one Walker Thomas, who was killed in June or July, 1940 (R. 117–118, 263). Petitioner joined his brother's staff as a deputy in October 1939, and the defendant Lewis was hired in the same capacity sometime after Thomas' death (R. 112, 168, 241, 263). The Government introduced testimony of a number of bootleggers who had carried on their operations in the county show-

ing that shortly after he took office, and continuing through 1942, Sheriff Stewart, personally and through petitioner and his other deputies, solicited and received from the witnesses various sums of money, in consideration of which it was agreed that the Sheriff's office would not interfere with their bootlegging activities and would warn them whenever federal agents came into the county (R. 61–64, 102–106, 108, 113, 117, 118, 131–132, 134–135, 156–157, 158–159). This "protection" continued so long as the bootleggers continued their payments, but when they ceased to do so they were raided by Sheriff Stewart, petitioner, or other deputies (R. 64–65, 72–73, 104–105, 122, 126, 133–135, 139–140, 157).

The testimony also showed a close association between petitioner and one John Henry McDuffie, a notorious wholesale bootlegger (R. 79, 133, 145; see also R. 93), who often acted as a go-between for the Sheriff's office in soliciting and receiving "protection" payments from other bootleggers (R. 131, 147, 156–157, 158; see also R. 84). On several occasions petitioner sent McDuffie to warn "protected" bootleggers that federal agents were in the county (R. 110–111, 157). Petitioner and McDuffie were often seen together (R. 78, 92, 115–116, 145, 184), and there was testimony that petitioner was in or near McDuffie's home on numerous occasions when

illicit liquor was being sold there (R. 79–80, 145–146). At one time McDuffie was seen unloading liquor at his home from an automobile which had been seized one week before by petitioner and the defendant Lewis from Walter L. Parker, an admitted bootlegger (R. 80–81, 95–97, 258–259).

On another occasion Lewis and one Johnson, who was assisting him, chased and caught W. J. Chancellor with a load of liquor (R. 175–176, 185). During the chase Johnson shot at and hit Chancellor's car (*ibid.*). Chancellor was taken to Sheriff Stewart and petitioner, who released him and his car after he had promised to pay them $100, which he did later pay to Lewis (R. 176–177, 179, 187, 192–193). Some time later federal agents seized Chancellor's car while it was being used by one Heath to transport liquor (R. 177, 186). The agents went to see petitioner about the bullet holes in the car and inquired whether any of the Sheriff's deputies had chased Chancellor in it. Petitioner admitted that the car had been chased but stated that the driver had escaped and that the Sheriff's office did not know his identity. R. 186–187). A few days later Lewis went to Chancellor and told him to tell the agents the same story if they questioned him (R. 178–179). Lewis also told Johnson to say nothing about the incident "because he didn't want to be exposed" (R. 186).

There was also evidence that petitioner was himself engaged in the illicit liquor business. On one occasion he instructed J. C. McDuffie, whom he employed in his produce business (see R. 75, 86–87, 89), to take some spoiled peaches to a designated person who would make them up into liquor (R. 83–84). Mary Emma Balkcom testified that petitioner had her arrange to buy a quantity of liquor and promised to pay her for it when it was delivered. Petitioner and John Henry McDuffie procured containers for the liquor from the local courthouse, and after it had been delivered to and paid for by Mrs. Balkcom petitioner cached it in a secluded spot. Later petitioner and McDuffie buried the liquor in Mrs. Balkcom's garden, whence it was stolen. (R. 151–156) Mrs. Balkcom also testified that petitioner, the defendant Lewis, and John Henry McDuffie proposed that she lure bootleggers into the county, where their liquor would be seized, and in return they proposed to give Mrs. Balkcom half of such liquor, which she would be at liberty to sell provided she paid them $5.00 a week for "protection" (R. 158–159).

ARGUMENT

I

No substantial question is presented by petitioner's contention (Pet. 13–15) that the indictment was fatally defective for failure to inform petitioner of the charges against him. The indictment charged generally that the defendants and

co-conspirators not named as defendants conspired to violate the internal revenue laws relating to alcoholic beverages, their manufacture, transportation, and sale, and the laws relating to extortion by an informer and misprision of felony. It alleged that the conspiracy "contemplated more than one offense of the character hereinafter described" (R. 3), and then set out with particularity the nature of the substantive offenses encompassed by the conspiracy (R. 4–5). It should be noted that there is no contention that the indictment did not charge the necessary elements of a conspiracy to commit offenses against the United States, and it is apparent from an examination of the indictment as a whole that petitioner could not have been in doubt as to the nature of the conspiracy alleged or as to the manner in which it was to have been effected. And though it is true that the indictment did not allege particulars as to persons, times, places, and circumstances, such details are not essential to the sufficiency of a conspiracy indictment. *Glasser* v. *United States,* 315 U. S. 60, 66; *Wong Tai* v. *United States,* 273 U. S. 77, 81; *Joplin Mercantile Co.* v. *United States,* 236 U. S. 531, 548–549; *Crawford* v. *United States,* 212 U. S. 183, 191–192; *Williamson* v. *United States,* 207 U. S. 425, 447–448, 449. "Such specificity of detail falls rather within the scope of a bill of particulars" (*Glasser* v. *United States, supra*), and petitioner did not seek particulars in the trial court.

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Nor is there any merit in petitioner's argument (Pet. 8, 10, 13) that the offenses of extortion by an informer and misprision of felony (Criminal Code, §§ 145, 146 (18 U. S. C. 250, 251)), which were alleged as objects of the conspiracy (R. 5), are unrelated to the alleged objective offenses against the internal revenue laws relating to liquor. While the indictment did not specify the particular offenses involved in the phases of the conspiracy having to do with extortion and concealment of felonies, it is apparent from the context that these were offenses against the provisions of the internal revenue laws specified in the indictment. Moreover, substantially all of the allegations of overt acts (R. 5–10) concerned specific acts of extortion and concealment in connection with offenses against the internal revenue laws. Hence, there is no basis for petitioner's claim that the indictment was bad because it charged a conspiracy to commit unrelated offenses. See *Ford* v. *United States,* 273 U. S. 593, 602; *Frohwerk* v. *United States,* 249 U. S. 204, 209–210; *United States* v. *Rabinowitch,* 238 U. S. 78, 86; *Schefano* v. *United States,* 84 F. (2d) 513, 515 (C. C. A. 5); *Hogan* v. *United States,* 48 F. (2d) 516, 517 (C. C. A. 5), certorari denied, 284 U. S. 668; *McDonnell* v. *United States,* 19 F. (2d) 801, 803 (C. C. A. 1), certiorari denied, 275 U. S. 551.

II

Petitioner's contention (Pet. 5–6, 11–13) that the prosecutor was guilty of prejudicial mis-

conduct is without merit. The grounds of his complaint will be considered in sequence.

(a) After a witness for petitioner had testified that petitioner's character and reputation were good the trial court asked the prosecutor whether he proposed "to offer any testimony contrary to the defendants' testimony." The prosecutor's answer, of which petitioner complains (Pet. 11), was that "We have got some but we won't use it." (R. 239.) However, the trial court immediately admonished the prosecutor that his remark was improper and excluded the statement (R. 239–240). Plainly, therefore, no prejudice resulted.[1]

[1] There is likewise no substance in petitioner's complaint that the prosecutor stated, contrary to the facts, that certain girls were "in the liquor business and assisting in the liquor business" (Pet. 12). In the sequence to which petitioner refers the prosecutor asked Government witness Mrs. J. C. McDuffie whether she had ever seen petitioner and John Henry McDuffie "together with any girls." There was an objection and the court asked the prosecutor whether he expected to show that "those girls were in the liquor business, assisting in the liquor business." The prosecutor answered in the affirmative, and the court overruled the objection. (R. 92.) Petitioner states that "This was not true, and no effort was made by the Assistant District Attorney to show that Willie Mae Hobbie [one of the girls referred to] had any connection with the liquor business" (Pet. 12). The facts are, however that the subsequent testimony of Mrs. Balkcom shows clearly that she had trafficked in illicit liquor and that on one occasion Mrs. Hobbie and petitioner accompanied Mrs. Balkcom and John Henry McDuffie during part of a trip the latter two made to arrange to purchase some whiskey for petitioner (R. 151–156). There was, in addition, testimony that Mrs. Hobbie was associated

Petitioner cites seven other instances (Pet. 11) wherein he contends that he was prejudiced by the prosecutor's alleged assumption of "prejudicial facts not in evidence." In three of the instances cited (R. 68, 78, 139) there was no assumption of unproved facts, but on the contrary, the prosecutor simply stated facts to which the witnesses had previously testified (compare R. 68 with R. 66, R. 78 with R. 77, and R. 139 with R. 134–135), and in two others (R. 76, 229) the trial court sustained objections to the prosecutor's statements and excluded them from the consideration of the jury (R. 77, 229).[2] In respect of the remaining instance relied upon by petitioner (R. 145), the record discloses that on direct examination Government witness Noah Wood testified that he had been employed by petitioner and the defendant Lewis in 1941 as a truck driver (R. 141); that during a conversation with Lewis the latter told him that "they had better park the truck, it wasn't making them any money"; and that he stated to Lewis that "if it wasn't making

with petitioner in bootlegging activities (R. 292, 294–295); and though on cross-examination Mrs. Hobbie denied such association, the credibility of the witnesses was for the jury to determine.

[2] In another of the instances cited by petitioner (R. 218–219), there was no objection to the prosecutor's question and, moreover, it occurred during the prosecutor's cross-examination of a character witness for petitioner and defendant Lewis and was clearly legitimate to show the witness's unfamiliarity with Lewis' activities.

enough by doing things justable [*sic*], I wasn't going to do anything unjustable and I reckon we would have to park it" (R. 143). On redirect examination the prosecutor asked Wood, "Just what did you tell him you wouldn't do unlawful?" There was an objection and then, evidently in explanation of what he expected to establish by the question, the prosecutor stated, "He said he wouldn't haul liquor in it and he would have to park the truck." Petitioner's counsel insisted that Wood had made no such statement and the court thereupon told Wood to step down (R. 145), thus preventing the prosecution from obtaining the expected answer. However, assuming that the prosecutor's statement was improper, it furnishes no basis for any claim of prejudicial error, for the witness had testified on cross-examination that he had done nothing unlawful during his employment by petitioner and Lewis (R. 144).[3]

[3] The prosecutor's statement, quoted on page 12 of the Petition, to the effect that it would be to the defendants' interest to "make * * * cases" against bootleggers who were not "paying off" (R. 254), was made in support of the prosecutor's objection to defense counsel's questioning of the clerk of the circuit court for Coffee County, called as a witness for the defense, regarding the number of convictions in that court in liquor cases during Sheriff Stewart's tenure (R. 254–255). The validity of the prosecutor's objection is indicated by the court's ruling that "Of course the fact that they arrested others, cases made against others would not be any defense, that they were not protecting these particular ones. I believe I will limit it to these people who have testified as witnesses in the case" (R. 255).

(b) Petitioner asserts (Pet. 5, 12) that the prosecutor assumed a bullying and insulting attitude toward defense witnesses. One of the witnesses involved in the instances cited (*ibid.*) was called as a character witness on behalf of petitioner and another on behalf of petitioner and the defendant Lewis and the prosecutor's cross-examination sought merely to show that these witnesses were unfamiliar with petitioner's activities in selling "protection" to bootleggers (R. 214–215, 216–219). The cross-examination of Lewis' former employer, another of the witnesses involved (R. 219), elicited that he knew nothing of Lewis' bootlegging activities (R. 220–221). In the final instance cited, after the witness had stated that he "imagined" a certain case was "still pending," the prosecutor merely reminded him that he was under oath and told him to testify only to matters within his own knowledge (R. 228–229). It is clear that the conduct of the prosecutor in his cross-examination of these witnesses did not exceed the limits of propriety and that petitioner's assertions of prejudice are groundless. Moreover, the scope and extent of cross-examination is within the discretion of the trial judge (*District of Columbia* v. *Clawans,* 300 U. S. 617, 632; *Alford* v. *United States,* 282 U. S. 687, 694; *Blitz* v. *United States,* 153 U. S. 308, 312), and, in addition, objections by defense counsel to specific

questions asked of the witnesses were sustained by the court (R. 215, 217, 218).[4]

(c) Petitioner also claims (Pet. 5–6, 11) prejudicial error in the remark of the prosecutor during his closing argument to the jury that in his opinion the testimony of the Government's witnesses showed "beyond all reasonable doubt that * * * [petitioner and the defendant Lewis] are guilty as charged" (R. 305). Petitioner has evidently confused the prosecutor's right to comment with the more limited right of the judge (*United States* v. *Murdock,* 290 U. S. 389; *Horning* v. *District of Columbia,* 254 U. S. 135). Of course a prosecutor can express to the jury the view that the evidence shows the defendant guilty; such an expression is implicit in every prosecutor's closing argument urging that the defendant be convicted. See *United States* v. *Holt,* 108 F. (2d) 365, 369–370 (C. C. A. 7), certiorari denied, 309 U. S. 672; *Di Carlo* v. *United States,* 6 F. (2d) 364, 368 (C. C. A. 2), certiorari denied, 268 U. S. 706; *Tuckerman* v. *United States,* 291 Fed. 958, 969 (C. C. A. 6), certiorari denied, 263 U. S. 716.

[4] Petitioner also cites (Pet. 12) the remark, "Just spit it out" (R. 107), which the prosecutor made to Government witness Arnett (R. 102), an admitted bootlegger (R. 103), on direct examination. The court sustained an objection to the statement but admonished the witness to answer directly or, "If you don't know say you don't know." At the same time the court, after an objection by the District Attorney, reprimanded defense counsel for insinuating that the defendants were not being given a fair trial. (R. 107.)

In sum, there is nothing in the incidents of which petitioner complains to support his contention that the prosecutor's conduct comes within the condemnation of this Court's decisions in *Berger* v. *United States,* 295 U. S. 78, and *Williams* v. *United States,* 168 U. S. 382, upon which petitioner relies. See also *Viereck* v. *United States,* No. 458, decided March 1, 1943. Moreover, as the court below said, the proof of petitioner's guilt was "clear and substantial" (R. 327; see also pp. 3–6, *supra*), and petitioner does not challenge this holding. In view of the great weight of the evidence, even if there was any impropriety in the incidents complained of they cannot be said to have affected petitioner's substantial rights and therefore do not constitute reversible error (28 U. S. C. 391). See *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 239–240; *Moore* v. *United States,* 132 F. (2d) 47, 48 (C. C. A. 5), certiorari pending, No. 745; *Weathers* v. *United States,* 126 F. (2d) 118, 119 (C. C. A. 5), certiorari denied, 316 U. S. 681; *Leche* v. *United States,* 118 F. (2d) 246, 247 (C. C. A. 5), certiorari denied, 314 U. S. 617; *United States* v. *Buckner,* 108 F. (2d) 921, 928–929 (C. C. A. 2), certiorari denied, 309 U. S. 669.

III

Petitioner cites several instances (R. 61–63, 77, 84, 109–110) in which he claims that the trial judge committed reversible error in admitting

hearsay testimony as to statements and declarations made to the witnesses, outside of petitioner's presence, by certain of the alleged co-conspirators (Pet. 6, 15–16). Examination of the alleged errors shows, however, that the judge's rulings on testimony of this nature were correct and that they in fact actually favored petitioner. In the very first instance cited by petitioner and thereafter at intervals throughout the trial and in his final charge the judge instructed the jury that testimony concerning declarations of the various conspirators was admitted only for the purpose of establishing the existence of a conspiracy as alleged in the indictment, and that such testimony could be considered only as against the declarant and others who were present at the time, although they were named only as co-conspirators, and should be given no heed in determining the guilt or innocence of the defendants on trial (R. 61, 76–77, 85, 132, 147, 168, 315–316, 319; see also R. 309).

Moreover, the testimony to which petitioner objects was given by persons named in the indictment as co-conspirators (R. 2–3, 60, 75, 102) and consisted of declarations of others of the conspirators either in furtherance of the purposes of the conspiracy or with reference to its common objects. Since there was abundant proof *aliunde* that petitioner was connected with the conspiracy the items of evidence complained of could have been admitted against him. *Glasser* v. *United*

States, 315 U. S. 60, 74; *Delaney* v. *United States,* 263 U. S. 586, 590; *Clune* v. *United States,* 159 U. S. 590, 593; *United States* v. *General Motors Corporation,* 121 F. (2d) 376, 408 (C. C. A. 7), certiorari denied, 314 U. S. 618, rehearing denied, 314 U. S. 710; *United States* v. *Woods,* 66 F. (2d) 262, 265 (C. C. A. 2); *Lewis* v. *United States,* 11 F. (2d) 745, 747 (C. C. A. 6); *Weinstein* v. *United States,* 11 F. (2d) 505, 508 (C. C. A. 1), certiorari denied, 273 U. S. 699; *Isenhouer* v. *United States,* 256 Fed. 842, 843 (C. C. A. 8). Petitioner was, therefore, favored, in view of the limited purposes for which the evidence was admitted.

CONCLUSION

The decision below is correct, and there is involved no conflict of decisions or question of general importance. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

ROBERT S. ERDAHL,
J. BENSON SAKS,
Attorneys.

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